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in this case, neither of those circumstances existed. And while it was necessary for the ends of justice to undo the whole transaction, in the North Carolina case, no such heroic treatment seems called for here. But, finally, there is the case of *State v. Rocker*.¹⁷ In that case, the prosecuting attorney who appeared before the grand jury and procured the indictment of the defendant had learned the facts of the defendant's case while acting as his counsel, previously. These facts appearing, a motion to quash the indictment was sustained on the ground that the indictment was improperly brought.¹⁸ That result may have been proper in that case, but there is no reason to extend its application to a case where there is no suggestion that there was anything improper in the action of the state's attorney in presenting the petition and filing the information in *quo warranto*, without any reliance upon his own knowledge but entirely at the instance of individual relators. On the whole, there seems to be no interest of the defendants which required forcing the state to file an entirely new information. They would have been fully protected, it is believed, if they had been restricted to their recognized right, by way of motion or injunction, to have the state's attorney excluded from appearing against them at the trial, and by having the proceeding conducted by the attorney-general or by a special state's attorney appointed for the purpose.

A JUDGMENT AS EVIDENCE IN A LATER PROCEEDING. — Every judgment has a double aspect: it is first an indication that the tribunal has made a finding as to the facts and rights upon which the applicant predicates his cause of action; it is also the *fiat* of the sovereign with reference to the cause of action, *res* or *status* before the court. In its aspect as a *fiat* of the sovereign, the judgment operates directly upon the subject matter of the action; in a personal action the cause of action is transmuted into a right;¹ in a divorce proceeding, *status* is determined;² while in an action of probate, the will is established.³

The first principle of *res judicata*,⁴ that a plea of former judgment is a

¹⁷ *Supra*, note 7.

¹⁸ Cf. *State v. Will*, 97 Ia. 58, 65 N. W. 1010 (1896). In this case, the improper conduct of the judge toward the grand jury was similarly held, in the same jurisdiction, to render an ensuing indictment invalid.

¹ As instances of this effect, note that a judgment, though without satisfaction, against one of two joint tort-feasors, or joint obligors, is a bar to an action against the other, for the cause of action, being single, is extinguished by the first judgment. *Brinsmead v. Harrison*, L. R. 7 C. P. 547 (1872); *King v. Hoare*, 13 M. & W. 494, 504 (1844).

² *Hood v. Hood*, 110 Mass. 463 (1872).

³ "The proceeding is, in form and substance, upon the will itself. . . . The judgment . . . determines the *status* of the subject matter of the proceeding . . . and makes the instrument, as to all the world, . . . just what the judgment declares it to be." Hall, J., in *Woodruff v. Taylor*, 20 Vt. 65, 73 (1847).

⁴ "The doctrine of *res judicata* is plain and intelligible, and amounts simply to this: that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterward be litigated by new proceedings either before the same or any other tribunal." *Foster v. The Richard Bus-teed*, 100 Mass. 409, 412 (1868).

complete bar to a second action upon the same cause, is a necessary corollary of the principle that the judgment operates upon the cause of action; it is a recognition of the legal effect of the prior judgment. If the judgment was rendered in a personal action, the plea of former judgment will be available only as between parties to that action, or their successors, for a right between two persons was thereby established. If, however, the judgment was rendered in an *in rem* action, all those interested in the property or *status* must respect the judgment, for their rights were thereby determined.

The second doctrine of *res judicata*,⁵ that the finding of the court as to facts and rights shall, under certain circumstances, be conclusive if the same matters come into issue in a later action upon a different cause, is not, as is the first doctrine, a necessary consequence of the legal effect of the prior judgment. It cannot be said that the facts which gave rise to the cause of action, as well as the cause itself, are merged in the judgment. This doctrine, then, is dictated by a policy of repose, for, though the primary interest of the sovereign is in doing justice between litigants, practical justice has been done, and the truth of a matter satisfactorily established, if the very matter now in issue was actually a point of controversy in a prior adversary proceeding *inter partes*, and the present parties were parties to that action or in privity with them.⁶ If the proceeding was *ex parte*, the guaranty of truth and justice inherent in an action *inter partes* is not present, and the judgment should not be conclusive as to any one, as to the facts upon which it is based.⁷ If the action was *in rem*, the judgment may establish a right or a *status* which is binding upon the world, but the decree should be conclusive as to the facts upon which it proceeds, coextensively with the dispute *inter partes* only. So, in a prize proceeding in admiralty, all those who were parties through their interest in the *res*, but no others, should be concluded;⁸ and a stranger to a probate proceeding, though obliged to recognize the rights created by the decree, should not be precluded as to the facts upon which the decree was founded.⁹

The function of a judgment in evidence will be perceived through an application of the preceding principles. The judgment record is proper evidence of the fact of judgment, and the finding of the court upon the

⁵ "It is a principle lying at the foundation of all well-conducted jurisprudence, that when a right or fact has been judicially tried or determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties and those in privity with them, in law or estate. . . . It must be an averment of a fact precisely stated on one side and traversed on the other, and found by the jury affirmatively or negatively in direct terms, and not by way of inference." Shaw, C. J., in *Sawyer v. Woodbury*, 7 Gray (Mass.), 499, 502 (1856). See also *Outram v. Morewood*, 3 East, 346, 355 (1803); *Duchess of Kingston's Case*, 20 How. St. Tr. 355, 537 (1776).

⁶ See 1 GREENLEAF, EVIDENCE, 16 ed., §§ 522, 523.

⁷ *Salem v. Eastern R. R. Co.*, 98 Mass. 431, 448 (1868).

⁸ *The Mary*, 9 Cranch (U. S.), 126 (1815). See *De Mora v. Concha*, 29 Ch. Div. 268 (1855).

⁹ "We may lay on one side, then, any argument based on the misleading expression that all the world are parties to the proceeding *in rem*. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or *status* which the judgment establishes." Holmes, J., in *Brigham v. Fayerweather*, 140 Mass. 411, 413 (1886).

facts in issue.¹⁰ It will therefore be introduced when either of the doctrines of *res judicata* is invoked. However, the judgment itself is, in neither of these cases, evidence: in one case it operates to terminate the action, in the other it excludes evidence as to the matter formerly litigated. The fact of judgment may, however, have a true evidentiary value, as when a prior conviction is shown for the purpose of impeaching the credibility of a witness.¹¹ And the judgment, or even a verdict, being the solemn determination of the tribunal as to facts in issue, may be given in evidence even against strangers, in proof of a fact concerning which reputation would be admissible.¹² But in such a case the judgment would have only a *prima facie* effect,¹³ and it would seem that only a judgment rendered in a controversial proceeding *inter partes* has the requisite guaranty of truth.

A recent case, *Illinois Steel Co. v. Industrial Commission*,¹⁴ raises the questions involved in this discussion. A common-law marriage was in issue, and the court held it improper to admit, in proof of this fact, the order of a probate court, between different parties, reciting the finding of the court in that matter. Obviously neither of the doctrines of *res judicata* can be invoked. Nor can the judgment be admitted as evidence, for it seems that reputation is inadmissible in proof of a common-law marriage in the absence of supporting evidence of cohabitation as husband and wife.¹⁵ In the principal case this was not only lacking, but there was evidence that the intercourse between the parties was adulterous in its inception. Under these circumstances, the judgment of the probate court might well tend to prejudice, rather than aid, the jury.

A PARTNERSHIP AND A JOINT ADVENTURE DISTINGUISHED. — In the recent case of *Brown v. Leach*,¹ a joint adventurer sued for contribution of profits earned by his colleague after the latter had ostensibly withdrawn from the enterprise with a view to excluding the plaintiff from participation in the profits which he was reasonably certain could be made. It was declared that the plaintiff was entitled to share in these profits in accordance with the terms of the joint adventure. In the course of this opinion the court said: "A joint adventure is subject to the same rules as a technical partnership." With regard to the issue before the court this statement is true, since in both there is a fiduciary relation between the parties and a consequent duty to share all profits accruing from the subject matter of the undertaking.² But as a general

¹⁰ See *Littleton v. Richardson*, 34 N. H. 179, 187 (1856); *Spencer v. Dearth*, 43 Vt. 98, 105 (1870).

¹¹ See 1 GREENLEAF, EVIDENCE, 16 ed., § 527.

¹² *Pile v. McBratney*, 15 Ill. 314, 319 (1853); *Chirac v. Reinecker*, 2 Pet. (U. S.) 613 (1820); *Reed v. Jackson*, 1 East, 355 (1801).

¹³ See 2 BLACK, JUDGMENTS, 2 ed., § 606.

¹⁴ 125 N. E. 252 (Ill.). See RECENT CASES, p. 865.

¹⁵ See 1 WHARTON, EVIDENCE, 3 ed., § 84.

¹ 178 N. Y. Supp. 319 (1919). See RECENT CASES, *infra*, p. 868.

² *Reid v. Shaffer*, 249 Fed. 553 (1918); *Ingram v. Johnston*, 176 Pac. (Cal. App.) 54 (1918); *Calkins v. Worth*, 215 Ill. 78, 74 N. E. 81 (1905); *Nelson v. Lindsey*, 179 Iowa, 862, 162 N. W. 3 (1917); *Irvine v. Campbell*, 121 Minn. 192, 141 N. W. 108